2009

Salt Lake City Corporation v. Big Ditch Irrigation Company, James Garside; J L.C.; Ryan Litke : Brief of Appellant

Utah Court of Appeals

IN THE SUPREME COURT

OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION, Plaintiff-Appellee, vs. BIG DITCH IRRIGATION COMPANY, a Utah nonprofit corporation; JAMES GARSIDE; J L.C., a Utah limited liability company; and RYAN LITKE, Defendant-Appellant.	Case No. 20090757

BRIEF OF APPELLANT BIG DITCH IRRIGATION COMPANY

APPEAL FROM THE ORDER AND FINAL JUDGMENT OF
THE HONORABLE ROBIN W. REESE

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LIST OF PARTIES

Parties asserting contractual water entitlement:

Represented before the trial court by Phillip E. Lowry, Leslie W. Slaugh, and Elijah L. Milne, of Howard, Lewis & Petersen, P.C., and by J. Bryan Quesenberry, of Hill, Johnson & Schmutz, L.C.:
BIG DITCH IRRIGATION COMPANY, a nonprofit corporation
JAMES GARSIDE, a shareholder
J L.C., a limited liability company
RYAN LITKE, a shareholder

Party asserting ownership of the water rights by transfer of title for all the contract water:

Represented before the trial court by Edwin C. Barnes, Steven E. Clyde, and Wendy Bowden Crowther, of Clyde, Snow, Sessions & Swenson:
SALT LAKE CITY CORPORATION, a political subdivision of the State of Utah

Other person named in the pleadings but who did not appear at trial:

LAYNE DOWNS, a shareholder (dismissed)

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED

a. The error of dismissing Big Ditch Irrigation Company's ("Big Ditch") antitrust counterclaim against Salt Lake City ("SLC") by applying a municipal status statutory defense, and by considering the wrong counterclaim (the original counterclaim had already been amended). Grant of a motion to dismiss is reviewed for correctness.[1] This issue was preserved below at R. 105-28, 202-16, and 251-65.

b. The error of dismissing Big Ditch's antitrust counterclaim against SLC without leave to amend. While discretionary, dismissals with prejudice without leave to amend are disfavored.[2] Relatedly, whether the district court erred in denying Big Ditch's motion to amend its pleadings to rehabilitate the antitrust counterclaim. The legal standard governing a district court's discretion is reviewed for correctness.[3] This issue was preserved below at R. 105-28 and 1109-69.

c. The error, on summary judgment, of ruling that an integrated contract transferred title to SLC despite contrary contractual language and contrary conduct by SLC. Relatedly, the error of ruling that the same water exchange contract vested Big Ditch with no entitlement to the use of water sufficient to file water change applications. Relatedly, whether

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[1] *Whipple v. Am. Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996).

[2] *Timm v. Dewsnup*, 851 P.2d 1178, 1183 (Utah 1993).

[3] *Whipple v. Am. Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996); *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201.

the district court erred by failing to review the plenary record in its denial of the motion as required by Rule 56(c), Utah R. Civ. Proc. The proper legal standards governing a decision are reviewed for correctness,[4] as are decisions construing the meaning of a contract[5] and interpretations of decisions of the Utah Supreme Court[6] and statutes.[7] This issue was preserved below at R. 461-76, 4034 and 5393-5912.

d. The error of denying a motion to reconsider on whether title had been conveyed to SLC. Abuse of discretion is the standard of review governing the denial of a motion to reconsider.[8] This issue was preserved below at R. 4019-4395.

e. The error of concluding that exchange contract water users may be implicitly restricted in their water use by straight-line geographic, not hydrologic, boundaries, to one particular use (irrigation), in perpetuity. The legal standards by which a district court makes its decisions are reviewed for correctness.[9] This issue was preserved below at R. 5393-5912.

f. The error of accepting two conclusory expert affidavits from SLC, refusing to admit two rebuttal expert affidavits submitted by Big Ditch, and refusing the affidavit of Big Ditch's president. An evidentiary decision is reviewed for abuse of discretion, except

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[4]*Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998).

[5]*Aquagen Int'l v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998).

[6]*4447 Assocs. v. First Sec. Fin.*, 1999 UT App 13, ¶ 9, 973 P.2d 992.

[7]*Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201; *Whipple v. Am. Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996).

[8]*Timm v. Dewsnup*, 921 P.2d 1381, 1387 (Utah 1996); *Whipple v. Am. Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996).

[9]*Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998).

correctness is used when considering the legal basis for such a decision.[10] This issue was preserved below at R. 398-407, 5357-65, 3186-88, 3917-18 and 1031-42.

g. The error of ignoring factual disputes concerning estoppel and modification in granting SLC's final motion for summary judgment, including resolving the inherently factual issue of reasonability. Summary judgment allows no material disputes of fact.[11] If a grant of summary judgment necessarily resolved factual issues, even implicitly, the district court has conducted a factual review and has made factual findings, which is error.[12] This issue was preserved below at R. 5402, 5421.

h. The error of denying summary judgment to Big Ditch when no set of facts showed the required elements of estoppel, modification or a defense to the statute of frauds. Denial of summary judgment is reviewed for correctness.[13] This issue was preserved below at R. 5393-5912.

DISPOSITIVE AUTHORITIES

Utah Code Ann. §§ 73-3-3 and -3.5 are attached in the Addendum, together with other relevant authority.

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[10] *Stevenett v. Wal-Mart Stores*, 1999 UT App 80, ¶ 8, 977 P.2d 508; *Gaw v. State*, 798 P.2d 1130, 1134 (Utah Ct. App. 1990).

[11] *Mast v. Overson*, 971 P.2d 928, 931 (Utah Ct. App. 1998).

[12] *Western Water, LLC v. Olds*, 2008 UT 18, ¶ 14, 184 P.3d 578.

[13] *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from the denial and grant of multiple motions for summary judgment in a civil case.

B. Course of Proceedings and Disposition Below.

Substantive Rulings. SLC commenced this case by filing a complaint against Big Ditch and four Big Ditch shareholders, Garside, Litke, Downs and J L.C.[14] R. 1. SLC and Big Ditch had executed a water exchange contract in 1905. The complaint alleged that Big Ditch had wrongfully filed change applications on its contract water; that, as the water's owner, SLC could veto any change application; and that Big Ditch and J L.C. had slandered SLC's title by filing the change applications.

Big Ditch and the shareholders filed an answer and counterclaim. R. 69. The counterclaim alleged, *inter alia*, breach of contract and antitrust violations based on SLC's disproportionate and illegal role as a water market player. SLC filed a motion to dismiss the antitrust counterclaim. R. 100. The district court granted SLC's motion, but not before the shareholders had dropped their claims, and Big Ditch had amended its counterclaim as a matter of right to address SLC's arguments.[15] SLC responded to the amended answer and counterclaims six weeks after they were filed. R. 343.

Big Ditch filed a motion for partial summary judgment that its contract water right was fixed based on creek flow (the "fixed quantity motion"). R. 220. Big Ditch argued that

[14]Downs was subsequently dismissed.

[15] The shareholders and Big Ditch took further action to dismiss the shareholders and reinstate the antitrust counterclaim. Since these efforts concern the shareholders, they are treated in the shareholders' brief, incorporated here by reference.

the diminishment claims were not supported by the contract, but rather it unambiguously promised a fixed proportionate quantity of water to Big Ditch.

SLC filed a cross-motion for summary judgment on its first two causes of action (SLC's "title" motion). R. 288. It argued that its delivery obligations were based on irrigable acreage in the Big Ditch service area, and relied on extrinsic evidence supporting diminution. It also argued the contract transferred title to SLC of all the contract water, on both sides of the exchange. Big Ditch countered that the contract was unambiguous and its plain meaning controlled, and that, if Big Ditch did not retain title, it still had the right to file change applications on its contract water.

SLC's title claim was a modern reversal of position. Accordingly, Big Ditch filed on April 7, 2008, another motion for partial summary judgment contrasting SLC's current and historical positions (Big Ditch's "title motion"). R. 2606. Big Ditch's title motion thus fit within the scope of its fixed quantity motions and SLC's title motion, R. 1378-79 fn. 1, and raised factual issues with SLC's motion.

The district court declined to hear argument on these three related motions together, even though oral argument on the first two motions was set four months after the third related motion was filed. This was despite Big Ditch's contention that the evidence in Big Ditch's title motion created factual issues over SLC's title argument, disputes evidenced by a plenary record review. R. 4034.

The district court did not mention Big Ditch's title motion in its ruling granting in part Big Ditch's fixed quantity motion and granting SLC's title motion. R. 3349. The district

court ruled that SLC had title to water on both sides of the exchange. Yet it also ruled that Big Ditch had a right to a fixed quantity of water under the contract, which it deemed unambiguous and integrated, with no limitation on nature or place of use. The district court reserved for trial whether there were equitable theories such as estoppel or modification that might reduce SLC's delivery obligation.

The district court's failure to acknowledge the pendency of Big Ditch's title motion and its factual issues prompted Big Ditch to file a motion to reconsider the decision granting title to SLC. R. 4016. While analytically linked, the district court de-linked Big Ditch's title motion and the motion to reconsider, denied them separately, R. 4833, 5260, and cited the analytical gaps created by their dissociation to deny them.[16]

On December 24, 2008, Big Ditch accepted *arguendo* facts SLC had adduced to substantiate its equitable theories, and moved for summary judgment, contending that those facts did not meet SLC's burden. R. 5387. SLC cross-moved on the same facts, R. 5985, and in responding to the cross-motion Big Ditch raised factual disputes, R. 5402, 5421, and challenged the facts' admissibility. R. 5355. The district court granted SLC's motion, R. 6339, reversing its decision of August 22, 2008 by placing nature and use restrictions on Big Ditch's entitlement to the use of water under the contract. It also ruled that Big Ditch could not file change applications on its contractual water entitlement.

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[16]Big Ditch argued either that the exchange contract was an exchange of usufructs or, alternatively, an exchange of title. The intervening ruling vesting SLC with title prompted Big Ditch to pursue the exchange of title argument, which it now acknowledges this Court need not necessarily reach: entitlement, not title, is the issue. The district court rejected this argument. R. 4833. Big Ditch filed a motion to reconsider the district court's denial of Big Ditch's title motion on September 22, 2008, R. 4010, which was denied. R. 5260.

Procedural and Evidentiary Rulings. SLC supported its title motion with an affidavit of Jeffry Niermeyer, SLC's director of public utilities. R. 349. Big Ditch moved to strike this affidavit as argumentative and legally conclusory, particularly with respect to the contractual intent of the parties. 408, 477 This motion was denied. R. 2945.

Big Ditch submitted the affidavit of the president of Big Ditch, James Garside R. 481, (also a party) to counter SLC's title motion for summary judgment. In order to rebut the argument that SLC would be harmed by honoring the 1905 contract, the affidavit documented SLC's surplus water supply. The district court struck the affidavit, stating that it dealt with antitrust issues (despite that the affidavit was offered solely on SLC's claims of harm). The district court struck only a portion of the Garside affidavit, but did not specify which portion. R. 2945.

On July 3, 2008, Big Ditch filed the affidavit of its expert, Ronald K. Christensen, Ph.D., and sought permission to file the affidavit despite the close of briefing on pending summary judgment motions. R. 3184. Oral argument on two of the motions had been set three weeks later, July 22, 2008. R. 3258. The affidavit rebutted the affidavit of Mr. Niermeyer, discussed the nature of Big Ditch's title to its water, and supported Big Ditch's fixed quantity and title motions. On September 11, 2008, Big Ditch filed a supplemental affidavit of Mr. Christensen reflecting his further investigation, with another motion seeking permission to file. R. 3373. The district court denied Big Ditch permission to file the first affidavit.[17] R. 4833.

[17]The district court did not address the September 11 affidavit.

On December 4, 2008, SLC filed a second affidavit of Mr. Niermeyer, R. 5308. Big Ditch filed a motion in limine to exclude this affidavit, R. 5355, arguing that it was legally conclusory. The district court denied the motion. R. 6324. Finally, the district court overruled Big Ditch's objection to the final order, R. 6349, prepared by SLC. R. 6357.

C. Statement of Facts. In 1905 Big Ditch and SLC entered into a water exchange contract. R. 19. Big Ditch transferred to SLC the right to divert and use the water it had been taking from Big Cottonwood Creek. In exchange, SLC would timely deliver a fixed amount of water to Big Ditch, tied to the measured flow in the creek. The exchange gave SLC high quality canyon water and gave Big Ditch a flow of water at Big Ditch's diversion point from sources of SLC's choosing. For the next thirty years SLC executed 31 other similar exchange contracts with other companies. R. 5310.

In 1914, *The Progress Co. v. Salt Lake City*, Civil No. 8921, adjudicated a dispute between SLC and the Progress Company. The decision fixed the amount of water SLC (on behalf of Big Ditch) could divert from the creek, and in turn recognized that SLC could take this water "by virtue of" the 1905 contract. R. 28.

In the intervening decades, SLC either never claimed or eschewed title to Big Ditch's contract water. R. 1383-92. During this time Big Ditch's service area gradually urbanized, and, while SLC continued to deliver Big Ditch's full contractual amount through the diversion structure, Big Ditch turned less water into its conduit. SLC also acquired water rights exceeding its contemporary or projected needs and leased these as "surplus." R. 6302. It also engaged in aggressive practices to control and eventually eliminate its exchange

partners, R. 2595, 4274-75, characterizing other water users as "dangerous" and "sinister" who would need to respond to SLC's "muscle." R. 6289-90.

In 2006 Big Ditch filed a number of administrative change applications to change points of diversion of its exchange water. SLC protested and then, in 2007, sued Big Ditch and various Big Ditch shareholders for filing the change applications. SLC claimed that Big Ditch had no residual entitlement to file such applications.[18]

SUMMARY OF ARGUMENT

The district court ruled that the 1905 exchange contract and a 1914 court ruling granted water title to SLC, on both sides of the exchange. This left Big Ditch with no residual entitlement to the use of water, and barred Big Ditch from filing change applications. This conclusion presupposed arbitrary contractual restrictions on place and nature of use. It also ignored SLC's own historical conduct and the express language of the contract.

The district court erred in finding that equity had reduced Big Ditch's contractual share, either through estoppel or modification. Disputed factual issues made summary judgment improper.

The district court erred by dismissing Big Ditch's antitrust counterclaim by (1) ruling on the wrong counterclaim; (2) failing to discern in the allegations cognizable antitrust violations, including SLC's aggressive efforts to drive its exchange partners (such as Big Ditch) from the water market; and (3) granting SLC antitrust immunity when SLC banks

[18]The balance of the facts are in the Course of Proceedings and Disposition Below.

water and sells it as surplus as a market participant.

ARGUMENT

Introduction. Sagebrush and cottonwood trees. This was likely the 1846 landscape dominating the site of the Matheson Courthouse. Later, it was transformed into farmland, and then into an urban, perhaps even industrial landscape, until today, where upon it sits a modern building with indoor plumbing.

It would be trite to say that water made this all possible. And only partially true. Water *development* made it possible. Flexible, transferrable, elastic water development. Water development not bound by arbitrary straight lines or oppressive regulation and restriction.

SLC and Big Ditch signed an exchange contract in 1905. It was a monument to flexible water development, allowing each party to use the best water suited to it. But water needs change with time. Big Ditch has realized that its irrigation needs in Midvale are going away. Its exchange water should be used elsewhere, for the benefit of other development. Irrigation needs have dried up; time to move on.

SLC defines "moving on" as death. The death of Big Ditch. This is the fate SLC foresees for all of its exchange partners, while SLC accrues far more water than it could ever need. SLC's efforts to kill Big Ditch are just a part of its strategy to dominate the valley water markets with unfair and illegal practices.

Big Ditch has water that it wants to use beneficially, through access to the change application process. Such water "rezoning" is crucial to preserving beneficial use. SLC

would deny such change, a privilege that even sewer effluent enjoys.

Big Ditch does not wish to go gently into the night SLC has prepared for it. Flexible water transfer, free from arbitrary restraint, and free from the illegal practices of a city doing far more than care for its citizens, is what Big Ditch seeks. Flexible transfer gives Big Ditch life, just as the cliché assigns water the same role to the Earth.

I. BIG DITCH HAS A STATUTORY ENTITLEMENT TO USE WATER.

At first, the district court correctly ruled that Big Ditch was entitled to a fixed delivery of water, and that its water use was not limited to irrigation or to its service area. It then reversed itself *sub silentio.* The district court also ruled that SLC had title to the contract water under *Progress Company v. Salt Lake City*[19] and the 1905 contract, and thus Big Ditch could not file change applications on the contract water. The district court erred. As a beneficial user of the contract water, Big Ditch has the right to use it, irrespective of who owns technical title to the water.

A. Big Ditch Has A Valuable Entitlement.

Claiming "title" is a way to attack another's entitlement to the use of water.[20] However, entitlement, as defined in Utah Code Ann. § 73-3-3, and not title, is what matters. Entitlement gives Big Ditch the right to file change applications. This Court need not reach whether Big Ditch (or SLC) received title to the contract water. "[O]wnership of water is far

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[19]Civil No.8921 (D. Utah 1914). R. 24.

[20] In *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310 (Utah 1993) , the irrigation company claimed title over the shareholder Payson City, and in *Strawberry High Line Canal Co. v. Bureau of Reclamation*, 2006 UT 19, 133 P.3d 410, the Bureau of Reclamation claimed title to Strawberry water in derogation of the users' rights.

more complex than ownership of other forms of property, and the mere existence of legal title does not determine all the rights of ownership. Indeed, even the term 'ownership' is an oversimplification."[21]

This Court has already found that the 1905 exchange contract vested Big Ditch with a significant entitlement. In *Ellerbeck v. Salt Lake City*,[22] SLC was challenged for issuing a bond underwriting that contract. The plaintiff challenged the constitutionality of a bond issued for an exchange, rather than a purchase. This Court raised *sua sponte* whether SLC was alienating water contrary to Section 6, Article 11 of the Utah Constitution.[23] The parties' focus on what SLC was receiving triggered scrutiny of what SLC was giving away.

SLC now contends that it conveyed no section 73-3-3 entitlement to Big Ditch in the 1905 contract. *Ellerbeck* contradicts this contention. SLC did convey substantial value in the contract, otherwise *Ellerbeck* would not have engaged in its express constitutional analysis.[24]

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[21] *East Jordan*, 860 P.2d at 317 (Durham, J., dissenting). Big Ditch does not concede that SLC has title, since vesting title in SLC was unnecessary to adjudicate the rights of the parties. SLC did not plead quiet title in its complaint. Rather, it assumed it had title, and then sought to prevent Big Ditch from filing change applications. Complaint ¶ 36 (R. 10-11). The dismissal of the slander claim mooted the title issue. SLC argued, R. 1228, that this Court vested title in SLC in *Progress Company v. Salt Lake City*, 173 P. 705 (1918), cited in *Salt Lake City v. Silver Fork Pipeline Co.*, 2000 UT 3, 5 P.3d 1206. *Progress* did not do so, as discussed below, and *Silver Fork*'s discussion of "title" was mere background to a dispute that had nothing to do with title.

[22] 29 Utah 361, 81 P. 273 (1905).

[23] Neither party raised the issue. The briefs are attached in the Appellants' Addendum.

[24] *Ellerbeck* went on to rule that since SLC received something of substantial value in exchange for the substantial value it conveyed away, the exchange was constitutional. 81 P. at 274. Perhaps *Ellerbeck* regarded the transfer from SLC as a transfer of actual title to the exchange water. The 1905 contract would then have effected a title-for-title exchange. While this may be a plausible reading of *Ellerbeck*, and one that Big Ditch would accept, it is not necessary for the Court to reach this issue.

This result is virtually identical with that of a later decision construing the Utah Constitution, *Genola v. Santaquin*,[25] where the Court held that a "perpetual and continuous" contract diversion right like that of Big Ditch amounts to, in all practicality, a water right. While *Genola* did not deal with "entitled to use" language, it is clear that the Genola Town's contractual right was deemed very valuable, even though it did not amount to title.

The entitlement Big Ditch received, acknowledged by *Ellerbeck*, makes Big Ditch a beneficial user of the contract water, entitled to use it how it pleases once delivered. The State Engineer's practice avoids the "ownership" question altogether and focuses instead on the legislative language of "entitled to the use of". These statutory interpretations should be given deference by this Court.[26] Entitlement, not ownership is dispositive, as a matter of legislative intent.

B. The Contract Conveyed an Entitlement.

The language of the fully integrated and unambiguous 1905 contract reflects a quid pro quo exchange of value.[27] The contract provides:

1. Big Ditch transfers its right to the use of its water to SLC (R. 19; ¶1);

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[25] 80 P.2d 930, 934-35 (1938)

[26] *LPI v. McGee*, 2009 UT 41, ¶ 9, 215 P.3d 135. The State Engineer assigns water right numbers to contractual rights. R. 41, 62 (Big Ditch change applications). The State Engineer is complying with the statutory "entitled to use" language and its statutory duty to administer water by recognizing the value of such entitlements. Entitlement, not title, arises throughout the code. For example, a right to the use of sewer effluent under contract (not title to the effluent) is the predicate to file effluent change applications, Utah Code Ann. § 73-3c-302, a practice SLC employs. R. 3471. *See LPI*, 2009 UT 41 at ¶ 11 (statute to be construed in harmony with it constituent parts, including other chapters).

[27] The district court was correct in ruling that the 1905 contract was a fully integrated and unambiguous document. R. 3353.

2. SLC agrees to "perpetually and continuously deliver" a continuous flow of water to Big Ditch, defined as a portion of the Big Cottonwood Creek flow. The water is to be suitable for the purposes of irrigation (R. 19; ¶2);
3. SLC agrees to "maintain all of the existing rights of [Big Ditch] to the waters and to the channel of said Big Cottonwood Creek, and to bring and defend, at the expense of [SLC] any and all suits for the purpose of maintaining said rights." (R. 21; ¶8);
4. SLC agrees that if it fails to deliver for 24 hours the "full quantity" of water it has promised, then Big Ditch may "retake" its right to creek water. If SLC fails to deliver the "full quantity" of water under the contract for a period of six months, the contract shall "terminate," and the parties rights shall revert to pre-contract status. (R. 21; ¶9)
5. SLC agrees to keep the diversion structure in good order in case of reverter. (R. 21; ¶7).

"Exchange" is key. Through it, Big Ditch, like a traditional water right owner, is entitled to a fixed amount of water, for no fee, from a specific diversion point, for its use. SLC delivers sufficient water for Big Ditch to take its fixed amount. Yet SLC claims title to all of the contract water, a notion alien to "exchange." SLC's ultimate contention has insistently been that it requires title to the canyon water to divert it, and title to the exchange water to control how it is delivered. SLC misses the mark. It may control how to convey and deliver the exchange water to Big Ditch, but cannot retain control over the water once it

reaches Big Ditch's diversion structure.[28] Just as an appropriation fixes a diversion right for a title owner, the contract allows SLC to take its water, and Big Ditch to take its water downstream. This relationship does not allow reaching along the stream anywhere to control Big Ditch.[29]

SLC apparently figured that its claim to the legal artifice of "title" would annihilate all of Big Ditch's control over its exchange water. This approach failed to consider that even a nonowner can be entitled to the use of water, and defeats the "exchange" intent behind the contract.

SLC's argument misconstrues title. It focuses on molecules of water rather than the specific right to divert water. An entitlement to water is not about molecules of water. Rather, it is about control, defined by where, when, how and against whom the water is used. Big Ditch has, under the contract, the right to divert water through its diversion structure in a specific proportionate amount, at specific times, in a certain priority. Thus, Big Ditch's exchange right is really no different than an appropriator's right to a specific amount of water from a point of diversion, except SLC has the right to pour different sources of water into the creek to compensate for the water it takes from the creek upstream. This water may

[28]Big Ditch takes its water passively from the creek via a control valve, which allows the desired amount of water from the creek into the Big Ditch system. R. 753. Because SLC has always had Big Ditch's full share available, R. 5499-5813, and has maintained water in reserve to perform the exchange agreements, R. 6064, its claim that "deliveries" have diminished, R. 6125, is untrue: it has always delivered the full amount. Big Ditch's calls have diminished, not SLC's deliveries.

[29] SLC itself has in the past recognized that title is not dispositive of one's right to control water: R. 5855, 5891, 5894. As discussed in detail below, this Court has addressed control issues without the need to focus on title. *See, e.g., Moyle v. Salt Lake City*, 50 Utah 357, 167 P. 660, 662-63 (Utah 1917)(exchange partner with SLC not limited to historical place of use in using exchange water; court did not address who had title).

come from Utah Lake, City wells, or even the creek water itself. No matter where the water comes from, however, Big Ditch's diversion right remains inviolate. Since molecules (creek molecules, Utah Lake molecules, well molecules) are the only factor distinguishing Big Ditch's exchange right from a pure appropriated right, Big Ditch's right to divert and place to beneficial use is intact. This is entitlement in its purest sense.

C. Diminished Calls Did Not Change the Contract.

To rebut Big Ditch's claims of entitlement, SLC claimed that Big Ditch's reduction in irrigation calls reflected a contractual intent of diminished delivery. Apart from having no basis in fact,[30] SLC's interpretation of the parties' intent was initially rejected by the district court. It ruled that the contract was fully integrated and required delivery of a proportionate fixed amount of water. The contractual term "irrigation purposes" did not tie delivery to irrigable lands in the Big Ditch service area. "Irrigation purposes" was not a delimiter of covenants; rather, it described the parties' status. The district court further concluded that the agreement contained no nature or place of use limitations.[31]

Reading an implied diminishment clause into the contract would violate strong Utah policy favoring flexible water development. Exchange contracts must be construed to foster

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[30] SLC has admitted, as shown in neutral uncontradicted commissioners' reports and through testimony of its own officials, that Big Ditch's "full share" has always been "available." R. 5417-18, 5499-5813, 6064.

[31] The district court ruled that SLC's interpretation would render paragraph 2 of the contract meaningless. R. 5159.

such development.[32] Restrictions on transferability, when imposed, are narrowly defined.[33] This Court's 100-year-old practice favoring flexible water development reflects that any restriction on the use of water, not needed to prevent direct prejudice to the restrictor, is suspect.[34] Such suspicion is warranted here where one of the contracting parties did not bargain for a restriction,[35] but instead now collaterally invokes it to make a claim to *all* of the water subject to the contract, on *both* sides of the exchange.[36] Apart from defeating beneficial use, SLC's interpretation skews the water market in SLC's favor by impeding transferability. Contracts allowing implementation of disfavored policies should be strictly interpreted so as to diminish their effect.[37]

In short, neither an exchange of title nor control is required to effect the agreement. SLC cites its initial control of molecules of water to control them forever. This is not

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[32] *Moyle v. Salt Lake City*, 167 P. at 662 (contract to be interpreted so as to avoid waste and encourage beneficial use).

[33] *East Jordan*, 860 P.2d at 315-16 (shareholders retain substantial protections even when deprived of right to file change applications); *accord Strawberry*, 2006 UT 19 at ¶ 37 (*East Jordan* is a shield for shareholders, not a sword against them).

[34] *East Jordan*, 860 P.2d at 315-16; *Syrett v. Tropic & E. Fork Irr. Co.*, 89 P.2d 474 (Utah 1939); *Baird v. Upper Canal Irr. Co.*, 70 Utah 57, 257 P. 1060 (1927).

[35] *See, e.g., Moyle*, 167 P. at 662-63 (exchange contract silent as to place of use; court refuses to infer historic place of use as contractually required, citing in support need for flexible water development policy).

[36] A change application on a share can be defeated only if the company can show prejudice resulting from the change. *See* Utah Code Ann. 73-3-3; *see also East Jordan*, 860 P.2d at 312-14.

[37] Utah property law favors the free alienability of property. *Redd v. Western Sav. & Loan Co.*, 646 P.2d 761, 763 (Utah 1982). Contracts restraining the alienation of property are generally invalid unless meeting strict exceptions of reasonability. *Redd*, 646 P.2d at 766-67; *see also Anderson v. Provo City*, 2005 UT 5, ¶26, 108 P.3d 701.

necessary to effect the exchange contract, does not reflect the parties' contractual intent, and violates the express language of the contract and Utah public policy.

D. SLC Is Precluded by its Conduct from Denying That Big Ditch's Exchange Rights Are an Entitlement.

The value of Big Ditch's entitlement is reflected in SLC's historically quiescent attitude toward it. The record from *Progress v. Salt Lake City*[38] and other historical documents show that SLC never claimed, and actually eschewed, control over Big Ditch's exchange water until about 1993.

The exchange contract arose out of SLC's need to secure water without funds. Exchange was the only way it could secure a reliable domestic supply. When SLC's exchange right was challenged by the Progress Company, SLC allied with its exchange partners to defend that right. SLC's legal positions in *Progress* now preclude it from taking a contrary position. SLC is similarly precluded, under theories of equitable and judicial estoppel, from departing from its historically consistent position that Big Ditch has an entitlement to use water. *A fortiori*, all of these theories bar SLC from claiming title to and/or control of all of the water subject to exchange.

In 1904 SLC secured bond funds to pay for infrastructure and the capital to secure the right to use water from the mountains. SLC approved a resolution stating that SLC was not able to purchase Big Ditch's rights outright.[39] SLC communicated to the public in open meetings and through this resolution that it was not seeking to acquire Big Ditch's water. R.

[38]References to *Progress* in this section are to the district court proceedings.

[39] R. 1379-80; 1457-65 (City in no position to purchase the farmers' water; an absolute exchange might be preferable, but this conditional one will do).

1379-81. SLC's litigation posture in *Progress* and Big Ditch's alliance with SLC therein also show how SLC consistently acknowledged the value of Big Ditch's water holdings. R. 1383-89. SLC continued this approach in its appeal, and in subsequent litigation. R. 1389-92.

Both the record and decree in *Progress* show that the *Progress* court did not interpret or construe the 1905 agreement. The court merely accepted it as a document that controlled the legal posture of the parties. *Progress* did not alter the contract's language. Indeed, *Progress* referred back to the contract, stating that SLC had "by virtue of" the contract acquired the right to use Big Ditch's water.[40]

The decree must be consistent with the record that generated it. Accordingly, the *Progress* court accepted SLC's and Big Ditch's mutually agreed position in the pleadings and briefing that the exchange contract gave standing to SLC to contest the Progress Company's claims. SLC represented that the agreement gave SLC the right to use canyon water, but never claimed control over Big Ditch's contract exchange right. Given this position, Big Ditch argued below that SLC was equitably barred under the doctrines of issue preclusion, claim preclusion, judicial estoppel and equitable estoppel from making a claim of title to all of the water on both sides of the exchange, and, *a fortiori*, from claiming that Big Ditch's exchange water was not an entitlement. Since title to the exchange water was not at issue in *Progress*, the court's ultimate mandate could not encompass any grant of title.[41]

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[40] R. 28. *Progress* adjudicated allocations among the various parties, ratios that had up to that point been undefined. Since SLC's rights against the Progress Company were derivative of Big Ditch's, Big Ditch's rights logically needed to be defined by the court.

[41] SLC argued below that *Progress* dispositively quieted title in SLC. This ignored the record and SLC's arguments in *Progress*. Nothing in *Progress* suggests that it intended to contravene or interpret the contract. The contract remains dispositive as to the exchange partners' rights, not

SLC has gone on record, in *Progress* and elsewhere, that it did not claim title to the canyon water. These arguments were briefed voluminously below in Big Ditch's title motion for summary judgment, and need not be repeated here. R. 1398-1416.[42] What does require scrutiny, however, is the district court's remarkable response. Rather than treat the arguments on their merits, it flatly stated that its intervening title decision had mooted them. R. 4834. A short while later, when considering Big Ditch's motion to reconsider the title issue, the district court revisited the estoppel issue by concluding that by arguing estoppel Big Ditch was impermissibly attempting to adduce parol evidence, and was being inconsistent with its prior litigation posture. R. 5260. The district court erred in two critical respects.

First, the preclusion and estoppel arguments do not construe the contract. Rather, they focus on SLC's conduct, which bars it from offering interpretations inconsistent with that conduct.[43] Second, while the contract is integrated, negotiations before it was adopted are admissible to show its meaning, as is evidence that clarifies, but does not contradict or

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Progress. Moreover, even if *Progress* did construe the relationship between SLC and Big Ditch, it did not materially change *Ellerbeck*'s conclusion that Big Ditch received an entitlement under the exchange. Were it somehow determined that the parties' representations in *Progress* (and the other representations SLC has made) meant that the parties exchanged title, they still made an exchange. An exchange is what SLC claimed in *Progress* and what Big Ditch relied on in participating as it did with SLC in that case.

[42]These arguments focused on exchange of usufruct versus exchange of title. The point was to show that SLC did not contractually gain absolute control of Big Ditch's entitlement.

[43] SLC seemed to have no difficulty branding Big Ditch's efforts to raise estoppel as violating the parol evidence rule while denying it was doing so through its own estoppel theories (discussed below).

vary from, the language of the contract.[44]

Here, the contract was unambiguous and integrated. The evidence concerning SLC's conduct both before and after the contract was executed is consistent with the agreement's express meaning, particularly the intent of the parties to effect an exchange. As for "inconsistencies," these were borne of the procedural accident that the district court did not consider Big Ditch's estoppel motion until after it had ruled on SLC's motion claiming title.[45] Big Ditch consistently argued that SLC was barred from claiming that Big Ditch did not have an entitlement, a position reflected by the contract's express language and SLC's historical litigation posture and conduct.

Most important, SLC did not *need* control over the water in Big Ditch's ditch to effect the parties' contractual intent. SLC did not, and cannot, show that its contractual benefits are impaired by Big Ditch retaining control of the water it receives.[46] Big Ditch retains its contractual privilege to take its contract water at its diversion point, and then use it as it pleases.[47]

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[44] Restatement (2d) of Contracts § 214; Restatement (2d) of Contracts § 212. *See, e.g., Cantamar, L.L.C.*. v. *Champagne,* 2006 UT App 321, ¶9, 142 P.3d 140.

[45] This was despite Big Ditch's repeated requests that the court address all of the motions together and not *seriatim. See, e.g.,* R. 1378-79 fn. 1.

[46] Losing a windfall arising from nondelivery is not impairment of a contractual right. SLC's failure to show any harm is treated in detail below (discussion of impairment required for any finding of estoppel).

[47] Irrespective of how title vests, Big Ditch received entitlement from the exchange. It is possible that SLC could have title to all of the exchange water while Big Ditch retains a residual entitlement to file change applications as an equitable owner of the exchange water. *See Strawberry,* 2006 UT 19 (discussed below). Most logically, if SLC received title to the canyon water, Big Ditch should receive title to the contract water. When confronted with this argument

E. Big Ditch's Contract Diversion Right is the Type of Entitlement Granting The Right To File Change Applications.

SLC argued below that any entitlement Big Ditch may have does not allow it to file change applications. Originally the district court rejected amount and place or nature of use restrictions on Big Ditch's entitlement, and then reversed itself. R. 6339. It ruled that such restrictions were implicit in the contract, and thus ultimately concluded that Big Ditch lacked sufficient control over its exchange right to qualify as one who is entitled to the use of water under section 73-3-3.

The district court ruled:

1. Big Ditch's exchange right did not amount to title.
2. Only an "'appropriator' or owner" of the water right could rightfully invoke entitlement status under section 73-3-3.
3. This Court has ruled that only an appropriator can file a change application.

Accepting *arguendo* the first premise, the last two premises are erroneous. The district court collapsed entitlement with outright ownership It equated "appropriator" with "owner," and thus concluded that only an owner can file change applications. This vitiates section 73-3-3's entitlement language.

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below, the district court ruled that the 1905 contract, although an exchange, did not "elevate" Big Ditch's right to an outright conveyance of water. R. 4835 The reason why, it appeared, was SLC's ability to designate what water SLC delivers. This source-based analysis is erroneous. It ignores the fundamental attributes of ownership still imbued within Big Ditch's exchange right (discussed above). The district court ignored one of its precedents (Big Ditch's right was fixed) while embracing another (SLC had title). The "fixed amount" ruling was dispositive. No matter where the molecules of water came from, SLC had the obligation to deliver them in a fixed proportion, for subsequent use as Big Ditch pleased.

Section 73-3-3 uses its language purposively. When construing a statute, courts are to assign words their plain meaning.[48] This Court's history of construing this language reflects that title or appropriative status are not dispositive.

The district court miscited *East Jordan* as requiring appropriator status to file change applications. *East Jordan* did not require one entitled to the use of water to be either an owner or an appropriator. Rather, it avoided the question of a shareholder's appropriator status by ruling that even if the shareholder once had ownership status, it had conveyed it away by becoming part of the collective.[49] *East Jordan* was more concerned with the contractual controls created by collectivization than title or appropriator status. As such, its holding was limited to the unique situation governing collectivization.[50]

This Court has recognized for decades the rights equitable users of water retain, including the right to file change applications as one "entitled to the use of" water.[51] *Prisbrey v. Bloomington Water Co.*,[52] cited by the district court, is a continuation of that line. *Prisbrey* dealt not with the rights of one versus the whole, but rather with the temporal distinction

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[48] *LPI v. McGee*, 2009 UT 41 ¶ 11.

[49] *East Jordan*, 860 P.2d at 312-13. Even so, shareholders still retain the right to petition companies to file change applications, a right companies can refuse only on specific and difficult to meet standards. *East Jordan*, 860 P.2d at 315-16; Utah Code Ann. § 73-3-3.5.

[50] *East Jordan*, 860 P.2d at 312-13. *East Jordan*'s focus on collectivization resulted in what some perceived to be nonsensical results. The *East Jordan* dissent noted that demurring to collectivization made an arbitrary distinction as to what shareholders can do with their water once it is delivered to them, especially when it allowed any use below the diversion point but restricted use above that point. *East Jordan*, 860 P.2d at 319-20 (Durham, J., dissenting).

[51] *Syrett v. Tropic & E. Fork Irr. Co.*, 89 P.2d 474, 475 (Utah 1939); *Baird v. Upper Canal Irr. Co.*, 257 P. 1060, 1066 (Utah 1927); *Moyle v. Salt Lake City*, 167 P. 660, 662 (Utah 1917).

[52] 2003 UT 56, 82 P.3d 1119.

between a lessee of water and its owner. A lessee has a right that in time will terminate. An owner, the lessor, does not. Recognizing this temporal horizon, this Court ruled in *Prisbrey* that a lessee may not file change applications, since allowing him to do so would derogate the rights of the owner.[53]

Prisbrey concluded that one who has a temporary right cannot apply for a permanent change. It echoes the reasoning in *East Jordan* that a subordinate water user (e.g., a shareholder) can push to the boundaries of its use as long as superior water users are not harmed.[54] Nowhere does it state that ownership or appropriator status is required to be a user of water under section 73-3-3.

The district court read *Prisbrey* to hold that *only* an original appropriator of a water right may file a change application. *Strawberry High Line Canal Co. v. Bureau of Reclamation*[55] confirmed that *Prisbrey* cannot be read so narrowly, and rather views users such as Big Ditch as equitable owners of water whose entitlement was sufficient to file a change application.[56] *Strawberry* thus repudiates the district court's reading of *Prisbrey*.

Strawberry reflects that neither *Prisbrey* nor *East Jordan* require ownership or appropriator status to have an entitlement to use water. In *Strawberry*, the United States

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[53] *Id.* ¶ 24.

[54] *See East Jordan*, 860 P.2d at 315-16 (shareholders wrongfully barred from filing change applications may sue).

[55] 2006 UT 19, 133 P.3d 410.

[56] *Strawberry* noted that *Prisbrey* should not be read outside of its context as a lessor/lessee case, and then clarified that "*Prisbrey* should not be read as undermining the importance of *use* as a basis for filing a change application under Utah's statutory scheme." *Strawberry*, 2006 UT 19 at ¶¶ 39-40 (emphasis supplied).

initially appropriated water, then accepted applications from homesteaders to use the water. The approved applications meant the homesteaders were "entitled" to a certain quantity of water "in perpetuity."[57] Later the association filed change applications, and the United States protested, claiming ownership. The association countered, claiming equitable title. The United States responded that the association had no right to file change applications on a mere contract right, a contract right that to date it had not fully beneficially used.

This Court disagreed with the United States, stating that the parties had jointly secured a certificate of appropriation. The court compared the United States to an irrigation company that holds water rights in trust for those who beneficially use them. It also specifically rejected any attempt to use Utah water jurisprudence, specifically *East Jordan*, as a sword against water users rather than as a shield to protect them.[58] The Court then chided the United States for attempting to use *Prisbrey* to defeat the association's claims.[59]

The Court went on to rule that the government could not act in derogation of the rights of the water users association, which in turn had specific fiduciary and contractual obligations to its shareholders.[60] The obligations of an exchange partner, like SLC here, are no less onerous. Indeed, they are augmented by the partner's obligation to approach the contract in good faith and with fair dealing.

Considering the full spectrum of *East Jordan*, *Prisbrey*, and *Strawberry*, being a water

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[57] *Id.* ¶ 16.

[58] *Id.* ¶ 37.

[59] *Id.* ¶¶ 39-40.

[60] *Id.* ¶ 43.

user, even without being a water owner, still matters. There are times when that use is subsumed to other competing interests (*East Jordan*: collectivization, *Prisbrey*: lease termination), but, overall, one with an entitlement to use may file change applications, even though ownership may be clouded or uncertain.[61]

Big Ditch has the right to file change applications, even if it is not deemed an "appropriator."[62] As noted, appropriator status is not what matters; right to use matters. Not only is Big Ditch virtually identical with the association in *Strawberry*; SLC is directly analogous to the United States. SLC, like the United States, claims to be the nominal owner of the water, and thus claims the exclusive right to control change applications. In doing so SLC ignores Big Ditch's right in perpetuity to water delivery, in a fixed amount tied to creek flows, and for any beneficial use.

Strawberry shows that use matters, not arcane determinations of appropriator status.

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[61] *East Jordan* was partially legislatively overruled by Utah Code Ann. § 73-3-3.5, which codified and clarified shareholders' rights vis-à-vis companies. *East Jordan*'s predecessors and progeny reflect the reality that *East Jordan* is a collectivization cul-de-sac on the spectrum of defining entitlement to the use of water. *See Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 749-50 (Utah 1996); *Consolidated Peoples Ditch Co. v. Foothill Ditch Co.*, 205 Cal. 54, 269 P. 915, 920-21 (1928) (*quoted in East Jordan*, 860 P.2d at 315 (allowing individual change applications from shareholders would "result in a state of inextricable discord and confusion among the owners of water rights of various sorts . . . .")).

[62] Alternatively, Big Ditch might still retain appropriator status. SLC did not acquire Big Ditch's priority status of appropriator through the contract, inasmuch as the contract did not represent a reappropriation of the canyon water. SLC understood this in *Progress*. Had SLC been able to stand on its own status as appropriator, there would have been no need to stand in Big Ditch's shoes in *Progress* to assert priority, nor to require Big Ditch to appear in the case and defend, with SLC, that priority. Moreover, the existence of the reversion right demonstrates that Big Ditch's appropriator status has been left intact, irrespective of the realignment of its diversion rights via the 1905 contract. Just like the association members in *Strawberry*, Big Ditch's role as a "participant[] in the appropriation process" confers upon it the right to file change applications, irrespective of Big Ditch's subordinate contractual status to SLC. *Strawberry*, 2006 UT 19 at ¶ 40.

Ironically, SLC has already acknowledged this in prior litigation, most notably in the 1993 water rights hearing where it unequivocally claimed that title was immaterial to its right to file change applications under the statute. R. 5856, 5891, 5894. Appropriator status is *an* (not *the*) indicium of entitlement. As a contract water user, Big Ditch has all the indicia of ownership of water as would an original appropriator, except the right to dictate which molecules of water flow into its diversion structure. This distinguisher is insufficient to strip Big Ditch of its right to file change applications.

The ultimate issue, never addressed by the district court, is whether SLC has veto power over Big Ditch's change application rights. The contract is integrated and unambiguous: once SLC delivers water to Big Ditch, Big Ditch is free to use it as it sees fit. This does not frustrate the contract's purpose. Analogously, even a post-*East Jordan* shareholder has such a right,[63] since an irrigation company has no absolute veto power over a shareholder's petition to file a change application. SLC, like an irrigation company, can obstruct its contractual partner's right only by showing harm to its contractual rights, which it has not done, and cannot do.[64]

Indeed, unlike a company and its shareholders, which are competing for one pot of water, here there are *two* pots of water, SLC's, and Big Ditch's. Absent collectivization and scarcity, SLC has no basis to claim control of Big Ditch's exchange water, and certainly can

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[63]*Baird v. Upper Canal Irrigation Co.*, 257 P. 1060, 1065 (Utah 1927), *cited in East Jordan*, 860 P.2d at 319 (Durham, J., dissenting).

[64]SLC never adduced any evidence of how Big Ditch filing change applications would impede its contractual duties or impede its rights to take water from the canyon. This lack of harm is further discussed in the estoppel discussion below.

show no harm or frustration of contractual intent from what Big Ditch does with its water once it is diverted.

The contract mandates that the parties are now and in perpetuity entitled to their full call of water.[65] Big Ditch's entitlement to file change applications is both contractually required and good public policy. Allowing Big Ditch to file change applications allows it to respond to urbanization and continue to use its water beneficially. Clearly, it can do so, given that SLC has always been prepared to deliver, and has delivered, its full contractual obligation to Big Ditch, regardless of Big Ditch's historical call.[66]

Ultimately, this case concerns boundaries on the free transferability of water for beneficial use. This Court prefers liberal transferability. It prevents urbanizing irrigation companies from dying, and it allows water to be beneficially used. Title is not dispositive. Use is.

II. NEITHER ESTOPPEL NOR MODIFICATION HAVE REDUCED THE CITY'S CONTRACTUAL OBLIGATIONS.

> Salt Lake City has relied on this [conversion from agricultural uses to residential and commercial development of] east bench lands as it developed the systems needed to meet the growing demand for culinary quality water. . . . [E]ssentially all of SLC's water resource planning, including the maintenance of the pump stations and canals utilized to deliver the exchange water, has been based on the reduction in the amount of water necessary to meet

[65] This right is virtually identical to that of Genola Town in *Genola v. Santaquin*, 80 P.2d 930, 934-35 (Utah 1938).

[66] Big Ditch adduced evidence below that SLC has not traditionally used all of its contract water, and has substantially more water than it requires. The scope and breadth of SLC's overallocation of water was specifically alleged in Big Ditch's first and second amended counterclaims, R. 251, 1109, is documented in its expert affidavits, R. 3193, 3376, and is discussed in the antitrust section below.

the combined irrigation needs under the 32 exchange agreements. Restoring the original capacity of the pump plants and canals would be extremely expensive and would, in my opinion, be a waste of public money since the original amount of water required by the combined exchange agreements could not be beneficially used on the lands served by those systems

--Affidavit of Jeffry Niermeyer, One-year Director of Public Utilities, Salt Lake City, December 3, 2008 R 5311-12

SLC has consciously maintained the physical capacity to deliver to individual exchange partners the full amount of water mentioned in the Exchange Agreements in order to avoid the possible claim of default until SLC's current obligation is adjudicated.

--Affidavit of Leroy Hooton, 27-year Former Director of Public Utilities, Salt Lake City, January 23, 2009 R 6064

Under SLC's exchange agreements, we are required to deliver as much water today as 80 years ago

–Memorandum of Leroy Hooton to Mayor Deedee Corradini, February 16, 1996 R 5840

SLC's obligation to deliver exchange water has not lessened since that first exchange agreement in 1888 . . .

–Leroy Hooton, *An AWWA Landmark: The Jordan and Salt Lake Canal*, September 17, 1993 R 5911

After the district court initially rejected SLC's incredible shrinking contract interpretation,[67] SLC argued that its delivery obligations had been largely eliminated, either through modification to the contract or through equitable estoppel. As the contrasting statements above show, SLC struggled to articulate this change Estoppel required SLC to show reasonable detrimental reliance on Big Ditch's conduct Modification required evidence that could defeat an integrated writing.

[67] 1st Niermeyer Aff., Ex. E, ¶¶ 9, 11, 14. The district court ruled that the contract was integrated, and nothing in the contract language suggested diminution, restriction to type of use, or restriction to place of use R. 349-79

Big Ditch requested evidence of SLC's claimed reliance and documentation of modification. There was none. Once this scarcity surfaced, Big Ditch moved for summary judgment, accepting *arguendo* SLC's inadequate discovery responses and asserting SLC could not prove estoppel or modification. SLC cross-moved.

The parties' burdens were dissimilar. Big Ditch assumed SLC's stated facts *arguendo* only for purposes of its motion (and only conditionally if they were deemed admissible). The facts, Big Ditch argued, could not support SLC's claims of estoppel or modification. Big Ditch also showed that those facts, if used offensively by SLC, were either inadmissible or disputed. SLC's main witness, Mr. Niermeyer, was a City employee. His evidence changed as SLC's theories changed. These flip-flops, together with Mr. Niermeyer's inherent bias, prompted Big Ditch to move to strike his statements as incredible, self-serving, internally inconsistent, and legally conclusory. R. 408, 477. The district court denied the motion, and consequently relied on Mr. Niermeyer's statements to make its ultimate conclusions that SLC had demonstrated detrimental reliance.

The district court implicitly resolved the factual disputes regarding Mr. Niermeyer's inconsistencies and credibility. It also resolved the far more serious dispute between Mr. Niermeyer's statement that SLC had changed its delivery capacity by relying on diminished calls, and the directly contrasting statement made by Mr. Niermeyer's predecessor, Mr. Leroy Hooton, highlighted above.

Apart from its self-serving factual foundation, SLC's estoppel and modification claims were SLC's already-rejected contractual intent arguments, dressed in equitable clothes.

SLC's "evidence" was based on contractual language that SLC claimed limited the place and use of exchange water, and was further based on a very narrow reading of contractual language that the district court had already rejected.

On the issue of equitable estoppel, the district court ruled that Big Ditch made decades of diminishing calls, and that even though SLC may have "reached certain legal conclusions concerning its obligations to Big Ditch under the 1905 Agreement," these played a "minor role in terms of reliance." R. 6341. The district court ruled further that "virtually all" of SLC's planning activity was predicated on Big Ditch's diminished calls. R. 6342.

This result errs on a number of fronts:

1. It impermissibly confused the standards of estoppel with those of waiver.
2. It concluded that Big Ditch's use could only be for irrigation in the Big Ditch service area, a conclusion related to the district court's contemporaneous conclusion that Big Ditch lacked sufficient entitlement to use its contractual water elsewhere, for other purposes.
3. It resolved factual disputes surrounding SLC's use, and ignored the fact that SLC had always been able to deliver Big Ditch's water continuously since the execution of the contract.
4. It assumed that SLC's devising of legal contingency plans was reliant conduct. Reasonable reliance requires a good faith belief in facts that define one's duty. One with such a belief does not devise legal contingencies based on alternate facts.

5. It ignored evidence demonstrating that reasonable detrimental reliance was legally impossible, and that SLC could point to no specific reliant conduct.

A. The District Court Applied the Wrong Standard of Proof and Confused Estoppel with Waiver.

The elements of estoppel are "first, 'a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted'; next, 'reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act'; and, third, 'injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.'"[68] Estoppel is a disfavored remedy.[69] "Equitable estoppel is intended to prevent a party from taking unconscionable advantage of its own wrong by asserting its strict legal rights."[70] The wrongdoing of the estopped party is highly relevant. Failure to collect what one is owed the "wrongdoing" of the collector.[71]

While Utah courts have never directly addressed the standard of proof for estoppel, clear and convincing evidence is the majority view.[72] In *Soter's, Inc. v. Deseret Federal Savings & Loan Association*, the court discussed the requirement of a distinct intent to prove a waiver or

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[68] *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 14, 158 P.3d 1088.

[69] 28 Am. Jur. 2d *Estoppel & Waiver* § 3; *see generally* 28 Am. Jur. 2d *Estoppel & Waiver* § 30.

[70] 28 Am. Jur. 2d *Estoppel & Waiver* §30.

[71] *Barnes v. Wood*, 750 P.2d 1226, 1230-31 (Utah Ct. App. 1988)(although landlord did not initially collect overdue rent and taxes, tenant was still obligated to pay the amount they contractually agreed to pay).

[72] *Kelly v. Wallace*, 972 P.2d 1117, 1123 (Mont. 1998) ("Equitable estoppel is not favored an will be sustained only upon clear and convincing evidence.") (citations omitted).

an estoppel.[73] *Soter's, Inc.* implies a clear and convincing standard subsumed under the "distinct" requirement, albeit in dictum.[74]

The district court compounded the error of applying the wrong standard of proof by confusing the requirements of waiver with those of estoppel. The district court purported to focus on detrimental reliance (required for estoppel, but not for waiver). However, the lack of any evidence of reliance and factual disputes surrounding such reliance shows that the two standards were in fact confused.

Waiver is not estoppel. Waiver is the knowing and intentional relinquishment of an existing right. The intent must be distinct.[75] While one's failing to enforce an executory contract may amount to a waiver of the right to seek damages for past breaches, such conduct does not terminate the *future* right to enforce the contract.[76] Nor is the failure to collect the "wrongdoing" of the collector so as to trigger an equitable right in the other party to stop collection.[77]

Waivers cannot reach into the future and defeat executory contractual rights. Estoppel can, but only upon a showing of reasonable detrimental reliance.[78] A lessor's waiver

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[73] 857 P.2d 935, 942 n.6 (Utah 1993).

[74] *Soter's Inc.'s* requirement is consistent with the general rule that estoppel is a shield, not a sword. *Youngblood*, 2007 UT 28 at ¶ 19; *see also* 28 Am. Jur. 2d *Estoppel & Waiver* § 31.

[75] *Soter's, Inc.*, 857 P.2d at 942.

[76] "A party may re-establish a condition or obligation that had been eliminated by waiver in the absence of an exchange of consideration or factors that support estoppel." *J.R. Hale Contracting Co. v. United N.M. Bank*, 799 P.2d 581, 585 (N.M. 1990).

[77] *Barnes v. Wood*, 750 P.2d 1226, 1230-31 (Utah Ct. App. 1988).

[78] *Id.*; 49 Am. Jur. 2d *Landlord and Tenant* § 259.

of an escalation clause does not bar the lessor from prospectively enforcing it.[79] In short, waiver can bar exercise of a one-time right. Estoppel can bar enforcing an executory right.[80]

The "distinctly made" requirement mandates that waivers be express. An "implied" waiver (a waiver through conduct or silence), being conceptually identical with estoppel,[81] requires an independent reasonable belief leading to detrimental reliance. The relying party must reasonably believe in the legitimacy of the other party's representations. A waiver cannot create an estoppel; there must be, in addition to waiver conduct, an *independent* wrongdoing of the waiving party on which the wronged party can reasonably rely. Objective reasonability is required.[82]

B. SLC Did Not Reasonably Detrimentally Rely on Big Ditch's Diminishing Water Call.

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[79] *Barnes*, 750 P.2d at 1230-31(landlord still entitled to collect overdue rent or taxes). Or, a landlord may waive its right to prohibit a liquor store on its premises by idly standing by while the store is built. *Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131 (Alaska 2008). With rent, the landlord is entitled to collect future rents, despite its past waiver. In the liquor store example, once the store is built and the waiver happens, the store remains as a monument to the landlord's inaction.

[80] *See* 49 Am. Jur. 2d *Landlord and Tenant* § 259. This is true whether a waiver is implied or express. An effective implied waiver must be reasonably relied on by the nonwaiving party, and is virtually identical with estoppel. *Carr-Gottstein*, 182 P.3d at 1139 & n.35. *Carr-Gottstein*, appears to depart from the Utah requirement that a waiver must be distinct. Nevertheless, its discussion focused on implied waiver, not express waiver, where distinctness becomes problematic in the act and in the proof. It supports the suggestion made in *Soter's Inc.* that with the "distinct" requirement, a clear and convincing burden of proof is appropriate.

[81] 28 Am. Jur. 2d *Estoppel & Waiver* § 37.

[82] *Youngblood*, 2007 UT 28 at ¶¶ 33-34.

SLC argued below that Big Ditch's silence, or conduct, changed its contractual obligations. This implied waiver/estoppel argument therefore required an independent reasonable belief leading to detrimental reliance, but SLC produced no such evidence.

The district court ruled that "virtually all of SLC's planning with respect to its water resources, its changes in infrastructure and its dealings with others in trading irrigation rights for culinary water rights have been predicated on the reduction in the amount of water taken by Big Ditch." R. 6342. The district court made findings in reaching its decision, and those findings (so large that the district court declared that they entirely accounted for the 100 years of City infrastructure) were largely inferred from a stunning paucity of evidence. On its face, it is absurd to declare that the conduct of a single exchange partner, out of 32 others, was the fulcrum on which turned a major city's development. Yet the statement is even more remarkable given the record in this matter, which is bereft of any specific evidence pinned to Big Ditch's conduct, and given the summary judgment standard, which requires all inferences to be made in favor of the nonmoving party.

1. SLC Alleged an Arcane Usage Pattern in Arguing Harm, Ignoring That Big Ditch Wishes to File Change Applications, Not Return to 1905 Practices.

In Big Ditch's motion for summary judgment it accepted *arguendo* SLC's evidence of reliance because that evidence was inadequate.[83] The district court, in contrast, used the evidence to resolve the matter for SLC. Even ignoring the already-addressed issue that the

[83] This assumption was made only alternatively. R. 5402. Big Ditch raised a number of factual disputes regarding the evidence's credibility and consistency in opposing SLC's motion. R. 5402, 5421.

district court resolved factual disputes in reaching its result, SLC's evidence was inadequate. SLC never showed it engaged in any reasonable reliance behavior.

Mr. Niermeyer's two affidavits were key to SLC's arguments. In his first affidavit he argued that the 1905 contract had built into its language diminution based on restrictions on nature and/or place of use. It stated that SLC made huge infrastructure improvements based on SLC's "expectation and understanding of its obligations under the 1905 agreement."[84] Being text-based, this affidavit contained no actual evidence of reasonable detrimental reliance.

An incorrect understanding of the law or of an integrated contract is not the representation of another party. Presumably, if diminution were the intent of the contract, SLC would have had this belief from the day of signing, and therefore it could not have been "induced" into such a belief by Big Ditch. Moreover, as a matter of law, there can be no misunderstanding of an integrated writing; by definition it is unambiguous and amenable to

[84]First Niermeyer Aff., Ex. E, ¶¶ 11, 14. R. 349. In paragraph 11, SLC did not provide evidence of reasonable detrimental reliance, but merely recited urbanization trends and claimed that Big Ditch cannot take its full allotment of water at this time. SLC invoked restrictions on place and nature of use as informing its understanding of its obligations under the agreement. Next, in paragraph 14 the affidavit states that Big Ditch has gradually decreased its demand for irrigation water, and that this decrease was consistent with SLC's understanding of its obligations under the agreement. Not only is this irrelevant, but it does not constitute evidence of how SLC has actually reasonably detrimentally relied on Big Ditch's conduct.

only one construction.[85] Furthermore, applicable law is incorporated into a contract, and as such a misunderstanding of the law is no basis for detrimental reliance.[86]

After the district court rightfully rejected the arguments in the first affidavit, Mr. Niermeyer submitted a second affidavit in which he abandoned the text argument. But, like the first affidavit, the second affidavit embraces a theory that there are nature, place, and amount restrictions on SLC's obligations, now arising from Big Ditch's conduct rather than the contract text.

Mr. Niermeyer merely avers that if Big Ditch were to suddenly make 1905-era requests for its water, delivered for irrigation in the historic Big Ditch service area, SLC might struggle to deliver the water. He fails to account for the event sparking the lawsuit—Big Ditch's filing change applications for use of water in other places and for other purposes. There is no evidence how the proposed change applications would harm SLC's ability to take creek water, or would affect SLC's method of delivering water to Big Ditch. SLC cited a litany of public works projects, but in doing so it continued to make its initial error of theorizing an impact on its infrastructure in the face of a fanciful 1905-era request to use all the water on the historical service area, and not from Big Ditch filing change applications. Moreover, it admitted it could not link any Big Ditch request with any

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[85] *See Tangren v. Tangren*, 2008 UT 20, ¶ 12, 182 P.3d 326; *cf. Barnes*, 750 P.2d 1226 (Utah Ct. App. 1988). The district court ruled that the contract was integrated, a conclusion Big Ditch does not dispute.

[86] *Reed v. Union Cent. Life Ins. Co.*, 61 P. 21, 21 (Utah 1900); 28 Am. Jur. 2d *Estoppel & Waiver* § 51.

particular impact on or harm to City resources.[87] At best, SLC was inviting the district court to infer such harm, impermissible at summary judgment.

Of course, most striking is SLC's failure to keep its story straight, as highlighted above. Not only did conflict present an unresolvable factual dispute, but it showed that SLC did not reasonably believe that Big Ditch was limited in its call. Three times Mr. Hooton so stated. R. 5408-11, 5839-45, 5901-11. Mr. Hooton hopes for an adjudication to keep the exchange companies from exercising their full contractual exchange rights. R. 5839. This shows that SLC acknowledged its exchange obligations while investing millions in infrastructure, and then denies those obligations by circularly citing to the infrastructure. Mr. Hooton further admits that SLC believes it must deliver exchange water at full contract levels.[88] Though not generated by SLC, the many years of neutral commissioners' reports representing to SLC that Big Ditch had a "Full Share Available" out of the Creek shows that SLC had notice that its obligation continued.[89]

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[87] SLC never produced evidence of how Big Ditch's change applications could harm it. Utah water policy encourages beneficial use as changes occur in populations. The final arbiter of potential harm caused by a Big Ditch change application is the State Engineer. SLC has shown no harm through past actions (which defeats SLC's estoppel claim), and can show no harm in the future (because the change application process protects it from such harm). Moreover, SLC has admitted it can deliver Big Ditch's full share of water. R. 5408-11, 5839-45, 5901-11, 6199. Big Ditch also adduced evidence below that, by any account, SLC has a great surplus of water. *See, e.g.* R. 473, 562, 6302.

[88]R. 5842 Mr. Hooton echoed these thoughts at a symposium at which he was the keynote speaker. R. 5901-12.

[89] SLC produced no evidence below that it disavowed or otherwise objected to these reports. R. 5499-5813.

This evidence demonstrates that SLC merely formed a legal theory as to its obligations, not based on any wrongdoing by Big Ditch, but by exercise of SLC's own legal skill in interpreting the contract. It did not reasonably factually rely; it legally opined.

Estoppel does justice when a party makes an innocent factual misstep based on deception by another. A party that prepares legal contingency plans is not a deceived innocent. SLC has always been able to deliver Big Ditch's full contractual share, and never reasonably believed otherwise. A diminished delivery requirement was a possible outcome SLC stated it wished to legally advocate. But a diminished call was not something on which SLC could reasonably rely so as to equitably avoid the contract.

SLC also did not show how Big Ditch's diminished calls were a but-for cause of its resource decisions. Estoppel requires that reliance be incompatible with the agreement as written.[90] The types of things SLC has done--develop infrastructure, forge agreements, secure water rights--are things that cities normally do. None of this was inconsistent with past, present or future full and complete performance of the 1905 agreement. It is not detrimentally reliant conduct.

SLC admitted that it could not cite to any single action it took in response to Big Ditch's conduct. R. 5311-12. Instead, it claims it acted as it did because all 32 of its exchange

[90] "[C]onduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written." *Am. Prescription Plan, Inc. v. Am. Postal Workers Union*, 170 A.D.2d 471, 472 (N.Y. App. Div. 1991).

partners were reducing their calls. It cites no evidence as to how these other exchange contracts would or could somehow act as an ensemble to increase SLC's burden.[91]

This ensemble argument made two erroneous assumptions. First, it improperly attributed features of other contracts to the 1905 contract. Because some of those contracts contained express limitations on nature or place of use, SLC assumed all exchange contracts did. Apart from these provisions' violating public policy favoring maximal beneficial use of water,[92] this "everyone does it this way" argument led to a second erroneous assumption: that every company might try, en masse, to *not* do it this way and restore their calls to historic

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[91] On the other hand, at least three of the cited exchange contracts *do* contain express restrictions on nature and place of use. R. 5310, 5403-04. This validated the district court's early ruling that no such restrictions existed in the Big Ditch contract, and vitiates the district court's later change of heart. Furthermore, the mass call SLC fears is fiction. SLC has reduced its delivery obligations to the 32 exchange partners over the last 50 years. SLC, for example, has adopted a strategy in its watershed management plan to eliminate exchange contracts entirely, either by acquiring shares or, more disturbingly, driving its exchange partners out of business. R. 4268-72, 4275, 6293-6323. SLC has been successfully implementing this plan. R. 4888-4930 (City buys out Big Cottonwood Tanner Ditch's right to transfer water from historic service area, which reduced City's exchange obligation); R. 6294. *See also* R. 2595, 2974, 3072-78, 3080, 6294, 6296, 6305, 6302, 499, 501, 503, 4274-75, 5840, 6290, 6322. Big Ditch requested that the district court consider evidence of this conduct as part of a plenary record review connected with SLC's motion for summary judgment on title, R. 4034, a requirement imposed by Rule 56(c) of the Utah Rules of Civil Procedure. The district court ignored these facts, either by striking the Garside affidavit to which SLC-authored documents asserting the facts were attached, or by essentially resolving them in SLC's favor and making inferences in favor of SLC, not Big Ditch.

[92] *See* Utah Code Ann. § 73-3-3.5; *see also East Jordan*, 860 P.2d at 316 n.24; *Syrett*, 89 P.2d at 475-76; *Baird*, 257 P. at 1065-66 (cited in *East Jordan*, 860 P.2d at 316 n.24). These cases reflect that beneficial use of water should be made and continued. Likewise, SLC is equitably barred from claiming that its contracting partner cannot beneficially use its water. *Campbell v. Nunn*, 2 P.2d 899, 901 (Utah 1931).

levels.[93] This argument ignored disparities among those contracts and made inferences (inappropriate at summary judgment) as to whether such a call was now even possible.[94]

SLC could not show reasonable detrimental reliance. It *admitted* that it could deliver Big Ditch's full contractual allotment. It *admitted* that rather than believing it had a diminished obligation, it opined that it "should" have such a legal obligation. SLC cannot invoke equity simply because it has embraced a legal position.

Even if the inconsistent Niermeyer and Hooton affidavits were credible, and SLC could show nature and use restrictions prevented it from delivering the old levels of exchange water, SLC could still show no impairment. If it is now difficult to deliver the water required by the contract, the remedy is simple: don't deliver the water. The contract allows SLC to make that choice, thereby removing any impairment. Of course, under this scenario Big Ditch gets to exercise its reversionary rights under the contract, but this is what SLC bargained for in the first place. In other words, there can be no prejudice if SLC no longer has to comply with the contract. However, SLC cannot expect to both be excused from the contract and keep the ongoing payments (creek water) required under the contract.

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[93] If SLC made these assumptions, did it ever intend to honor the agreement as written? The Big Ditch contract was negotiated as it was despite being different from other contracts, and with the knowledge that the full share was required to be available.

[94]Among those inferences was the reasonability of SLC's reliance. Generally, the reasonability of a belief is a fact question. *Ilott v. Univ. of Utah*, 2000 UT App 286, ¶ 18. The district court did not address the reasonability of SLC's belief, focusing instead exclusively on SLC's reliance. Reasonability was implicit in the district court's finding of reliance and conclusion of estoppel. The district court thus implicitly resolved factual disputes surrounding SLC's reasonability (despite Big Ditch's arguments to the contrary).

SLC's retooling argument, and therefore its alleged harm, presuppose 1905 place and nature of use restrictions. These restrictions violate public policy. As already noted, an implicit restriction in a water exchange contract on place or nature of use (absent demonstrated impairment to an interested party) contravenes Utah law The opposite policy controls. Beneficial use is the measure of water rights in Utah, and the freedom to use water rights for different uses and in different places is the heart of that policy.

The importance of this public policy is magnified when applied to irrigation companies. SLC used Big Ditch's status as an irrigation company to justify Big Ditch's death through urbanization. Irrigation companies, by their nature, must evolve to meet the changing needs of their shareholders. Urbanization should not be, and is not, fatal to an irrigation company. Companies, through change applications, are able to allow their shareholders to respond to development demands. Big Ditch, by filing change applications, was simply preserving beneficial use through flexibly meeting development demand. SLC asks of the 1905 contract: "How in the world can we deliver corn to your cows now that the buggy roads are gone?" Big Ditch responds: "Use a semi and take it to the ethanol plant."

C. The Exchange Contract Was Not Modified by the Parties' Conduct.

The district court had ruled previously, citing *Tangren v. Tangren*,[95] that the parties' course of performance[96] did not affect the interpretation of the contract, since the contract is integrated. R. 3353. In its July 2009 ruling, the district court reversed itself, stating that the parties' "historical conduct" showed that they modified the 1905 contract agreement to inject

[95]2008 UT 20.

[96]Or course of dealing (SLC intermixed the terms in the first instance).

into it a diminution component, irrespective of the statute of frauds requirement that modifications be written.

The ruling violates *Tangren*. The parties' conduct in the performance of an integrated agreement is irrelevant. The document's integration bars conduct evidence under the parol evidence rule and the statute of frauds. Yet the district court not only admitted this evidence, but, as noted above, also ignored factual disputes concerning whether SLC was entitled to rely on it. The district court relied on estoppel to bar Big Ditch from raising the statute of frauds, the same estoppel used to bar Big Ditch from enforcing the contract as written. In so doing the district court again resolved factual disputes and made inferences adverse to Big Ditch.

To show a modification, SLC needed to avoid the statute of frauds. Under the doctrine of partial performance, it had to show by clear and convincing evidence that Big Ditch partially performed the modified agreement, and that SLC reasonably detrimentally relied on that perfomance.[97] In ruling for SLC, the district court articulated the wrong legal standard. It raised estoppel as a defense to the statute. However, "estoppel" is not a defense to the statute of frauds. The statute can be defeated only through a number of specifically articulated and old common law defenses, among them partial performance.

The district court missed this point. It created a new garden-variety estoppel exception to the statute of frauds to avoid the strict requirements partial performance

[97] *Bamberger Co. v. Certified Prods.*, 48 P.2d 489, 492 (Utah 1935).

imposed. Its decision even goes so far to distinguish its new-found exception.[98] The district court erred. In its effort to create new law, it was citing language from a *partial performance* case.[99] Yet it jettisoned partial performance's requirement of exclusive referability.[100] This contrived standard was incorrect. Partial performance is the only viable exception to the statute. Partial performance evidence must be strong, and be "acts-oriented rather than word-oriented."[101] Most important, those acts must be "exclusively referable" to the modified contract.[102]

SLC claimed that the contract was modified so as to reflect diminishing calls. While SLC's acts of partial performance were, presumably, modifying its infrastructure, it admitted that it had no evidence tying its allegedly reliant conduct to Big Ditch's actions, and further admitted that it has always been able to deliver Big Ditch's full share of water. SLC's conduct is referable to its own prudent planning, not a modified contract.

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[98]Invoking "estoppel," the district court did wish to "delve into" partial performance. R. 6343. The district court accepted Big Ditch's contention that the contract was covered by the statute of frauds. Utah Code Ann. §§ 25-5-1 to 25-5-9; *see, e.g.*, *Spears v. Warr*, 2002 UT 24, 44 P.3d 742 (overruled on other grounds by *Tangren v. Tangren*, 2008 UT 20, 182 P.3d 326). The district court focused on barring Big Ditch from enforcing the statute, not the statute's legal applicability.

[99] That is, *Bamberger*. *Bamberger* also recognized that it was operating within one of the commonly-recognized exceptions to the statute. *Bamberger*, 48 P.2d at 491-92.

[100]Ironically, even though the district court's new exception to the statute was legally fictitious, SLC still failed to meet it. For the same reasons it failed to show estoppel to impose diminution, SLC failed to demonstrate, with clear and convincing evidence, reasonable detrimental reliance.

[101]*Spears*, 2002 UT 24 at ¶ 24.

[102] *Id.*

III. THE DISTRICT COURT ERRED IN MAKING VARIOUS EVIDENTIARY AND PROCEDURAL RULINGS.

The striking of the Christensen affidavits was error. He was Big Ditch's expert, and his opinions directly related to Big Ditch's entitlement arguments in its fixed quantity and title motions. The district court's reasoning reveals its error: it merely stated that the record was already large and that Mr. Christensen's affidavit would be "unnecessary and unhelpful," R. 4835, a direct and ambiguous quote from SLC's opposition to the affidavits. R. 4361. The district court erred. It first purported to engage in an admissibility analysis, but cited no rule supporting its conclusion. The affidavits were submitted in support of Big Ditch's summary judgment motions and to rebut the City's affidavits. Rule 52 of the Utah Rules of Civil Procedure requires denials of rule 56 motions based on multiple grounds to articulate the grounds for denial. *A fortiori* this principle applies to striking documents in support of Rule 56 motions.[103] Relatedly, evidentiary rulings require citation to the evidentiary standard that informed the district court's discretion.[104]

The district court also purported to engage in a timeliness analysis, stating that there was no way to submit further affidavits once briefing had closed. This issue has not been addressed by this Court since Utah Rule of Civil Procedure 6 was amended. The rule once allowed the filing of affidavits up to the day before the hearing.[105] Big Ditch candidly

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[103]In its oppositions, SLC stated several grounds for relief. R. 3250, R. 4360.

[104] Rule 103(a)(2) of the Utah Rules of Evidence requires a definitive statement on the record about why the evidence was excluded.

[105] Until April 1, 2004, Rule 6(d) stated: "When a motion is support by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them

acknowledged the new rule's silence on timing, and invited the district court to clarify, yet still admit the affidavit. R. 3186. Instead, the district court treated Big Ditch's candor as an admission that there was no legal basis to allow the affidavits. This Court has now ruled that it is not necessary to submit all supporting documentation together with the opening memorandum, and this reasoning supports Big Ditch's approach below.[106] The district court erred.[107]

Big Ditch strongly objected to the final order prepared by SLC. The order eliminated anything favorable to Big Ditch, expanded the district court's memorandum decision, and sanitized inconsistencies in the district court's reasoning. Most alarming was the order's

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to be served at some other time."

[106] *Clegg v. Wasatch County*, 2010 UT 5 at ¶ 31.

[107] Similarly, the Garside Affidavit, R. 481, was improperly excluded. The district court claimed the affidavit was offered for antitrust, rather than the basis claimed by Big Ditch (lack of impairment), R. 2945, and then used the erroneous basis to exclude it. Moreover, it only partially excluded it, and did not articulate which part. SLC, in contrast to Big Ditch, succeeded in getting in its key affidavits (those of Mr. Niermeyer), R. 2945, 6324, despite the fact that they were largely argument, were legal conclusion, and lacked foundation. *See Butterfield v. Okubo*, 831 P.2d 97, 103 (Utah 1992)(expert affidavits have heightened foundational requirements). Moreover, Mr. Niermeyer improperly relied on a summary of business records without making available the originals, *Trolley Square Assocs. v. Nielson*, 886 P.2d 61, 66 (Utah Ct. App. 1994), and his summary was inadmissible because it was not kept in the ordinary course of business (it was prepared solely for litigation). *See Shurtleff v. Jay Tuft & Co.*, 622 P.2d 1168, 1173-74 (Utah 1980). The district court cited Mr. Niermeyer's" institutional knowledge" as foundation, even though the affidavit cites "personal knowledge" and possession of City records for foundation. R. 349-50. Wisely so, since there is no such thing as "institutional knowledge" as a foundational basis. Rather, it arises in banking cases, *e.g., United States Bank Nat'l Ass'n v. HMA, L.C.*, 2007 UT 40, ¶ 12, 169 P.3d 433; and fourth amendment cases, *e.g., United States v. Adkins*, 169 Fed. Appx. 961, 967 (6th Cir. Ky. 2006). Even if applicable, institutional knowledge requires active seeking of information, *Davis v. Dept. of Justice,* 460 F.3d 92, 99 (D.C. Cir. 2006), not merely Mr. Niermeyer's exercising "custody and control of SLC records" (he never once avers he reviewed any of the records under his control).

twisting of the memorandum decision's mandate: "the Court . . . does not decide the more specific question of the precise amount of water which SLC is now obligated to deliver." R. 6344. By definition, imposing place and use restrictions defines Big Ditch's rights with a precision the district court eschewed.

IV. THE DISTRICT COURT ERRED IN DISMISSING BIG DITCH'S ANTITRUST COUNTERCLAIM.

The district court acted on the wrong counterclaim when it dismissed the appellants' antitrust counterclaim. With respect to Big Ditch,[108] there were substantial changes that insulated it from the alleged weaknesses cited by the district court.[109] Big Ditch sought permission to file a second amended counterclaim to further address those alleged weaknesses. It showed that SLC was an aggressive water market player far exceeding its role as a supplier to its citizens. It alleged water "banking", "surplus" sales that annually generate millions in revenue for SLC, and acquiring large numbers of water shares to control both companies and water beyond its present or foreseeable needs. R. 1126. While abuse of discretion is the standard of review for motions to amend, denying such motions is disfavored,[110] especially here where it is filed early in the litigation.[111]

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[108]The shareholders treat their counterclaims' dismissal in their brief, here incorporated by reference.

[109]The district court found that Big Ditch failed to allege that SLC competed with Big Ditch in the same relevant marketplace, and that allegations of unilateral action were fatal to the antitrust claims. The district court erred: Big Ditch demonstrated at length the specificity of its allegations, R. 109-22, and also showed that unilateral conduct is sufficient to state a claim for violation of the act. Utah Code Ann. § 76-10-914(2) (2007).

[110] *Timm*, 851 P.2d at 1183. Dismissing without leave to amend is highly disfavored. *Intermountain Physical Medicine Assocs. v. Micro-Dex Corp.*, 739 P.2d 1131, 1133 (Utah Ct. App. 1987); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 654 (3d Cir. 1998). Motions to

Apart from misconstruing antitrust law in assessing Big Ditch's counterclaims, the district court also misapplied the exception that antitrust law creates for municipalities. The Utah Antitrust Act does not apply to "the activities of a municipality to the extent authorized or directed by state law."[112] The exception applies only "when the anticompetitive conduct alleged by the plaintiff 'is a foreseeable result' of a state's grant of authority in a particular area." *Id.* It is not enough for the municipality to simply act pursuant to a statute.[113]

The district court ruled that SLC's water banking and surplus sales were a foreseeable result of its compliance with Utah Code Ann. § 10-8-14, which allows extraterritorial surplus sales. Yet Big Ditch's allegations show that SLC's conduct goes far beyond the scope of the statute, and is not a foreseeable result of it.[114] The district court further erred by relying on section 10-7-4(1) of the Utah Code, which allows municipalities to purchase water. This is not a "clearly articulated and affirmatively expressed . . . state policy" to displace competition.[115]

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dismiss should not be granted without giving the losing party leave to amend. *See Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, ¶ 15, 203 P.3d 962.

[111] The second amended complaint was filed on March 4, 2008, very early in discovery and only four months after the initial dismissal.

[112] Utah Code Ann. § 76-10-915(1)(f); *see Summit Water Distrib. Co. v. Summit County*, 2005 UT 73, ¶ 14, 123 P.3d 437 (a party is only exempt if it is a "municipality" and its actions are also "authorized or directed by state law").

[113] *Id.* ¶ 41.

[114] *County Water Sys., Inc. v. Salt Lake City*, 278 P.2d 285, 290 (Utah 1954).

[115] *Summit Water Distrib. Co.*, 2005 UT 73 at ¶¶ 36, 45. Even if SLC's actions were "authorized or directed by state law," SLC's actions would still not be exempt from the Utah Antitrust Act because SLC is acting as a market participant, rather than as a "municipality." *Id.* at ¶ 46 n.10

Finally, the district court erred because the "municipality exception" is an affirmative defense, with the burden squarely on SLC, yet SLC submitted no evidence justifying the application of this defense.[116] The district court also failed to strictly, and narrowly, construe the law against SLC, as required.[117]

CONCLUSION

SLC wishes to restrict Big Ditch to 1905 uses. By doing so, it threatens Big Ditch's very survival (SLC's ultimate goal). While SLC may argue that Big Ditch's death was written into the contract, or that Big Ditch has invited death through its conduct, equity demands otherwise. Equity demands that if two parties enter into a mutually beneficial water exchange, both parties should get their full benefit of the bargain. Big Ditch has perpetually and continuously honored its agreement with SLC; equity demands the same of SLC.

This Court should confirm that Big Ditch's perpetual right to the use of water under the 1905 contract is a water entitlement sufficient to meet the requirements of section 73-3-3. Big Ditch should have access to the water transfer process. Further, both SLC and Big Ditch mutually should be entitled to their respective full fixed amounts under the exchange.

The district court should be reversed, with summary judgment being entered in favor of Big Ditch's entitlement so it may file change applications on its water in the full contractual amount contemplated by the contract's language. Its antitrust claims should also be reinstated. Only this result can restore the rights Big Ditch bargained for 105 years ago.

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[116] *See id.* at ¶¶ 47-48.

[117] *Id.* at ¶ 29.

RESPECTFULLY SUBMITTED this 25th day of February 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 1 day of March, 2010.

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